



DELAYS IN THE GATEWAYS? IMPLICATIONS FOR CONSTRUCTION CLIENTS AND HIGHER-RISK BUILDING WORKS

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Introduction

Delays in Gateway Two and Three building control approval processes for higher-risk buildings under the new building safety regime have significantly impacted the progress of remediation works, construction starts, and the Government's ambitious goal of constructing 1.5 million homes. Throughout 2024, industry press reports indicated that the Building Safety Regulator (BSR) was acclimatising to implementing the new regime and potentially facing resourcing and capacity issues, which may have exacerbated the delays. The industry is similarly adapting to the new process and requirements, but limited guidance has been provided. Parties should ensure they are familiar with the requirements of the new regime and consider how it may affect ongoing projects and contracts.

Background

In October 2023, the BSR became the Building Control Authority for all higher-risk buildings (HRBs) in England. Under the new regime, developers are required to apply to the BSR for building control approval for all new construction work that falls within the higher-risk category.

Gateway processes

Gateway One – land use and planning matters related to fire safety

Since 1 August 2021, a fire statement must be provided when submitting planning applications in relation to residential and educational accommodation buildings in England which are 18 metres, or seven or more floors in height. More recently, the BSR/ Health & Safety Executive (HSE) published [guidance](#) regarding Gateway 1, including the importance of early engagement during this first step, the applicable process, and details of the HSE's approach. According to the guidance, the industry is evidently adapting to the new review process, with the number of concerns raised at this early stage reducing from 57% in 2022 to 16% in 2024.

Gateways Two and Three – building control approval for higher-risk buildings

There have been greater industry concerns in relation to Gateways Two and Three (i.e. the building control approval and completion certificate stages). Whilst the legislation includes deadlines for determination of 12 weeks and 8 weeks respectively, it is widely acknowledged that the BSR will struggle to meet these due to resourcing constraints. We are aware of projects where responses have taken up to 30 weeks.

There is clearly going to be a bedding in process as both the industry and the BSR adapt to the new approach. Initial indications from the BSR regarding Gateway 2 applications already submitted indicates that many of them were incomplete or unclear, rendering them unsuitable for approval. According to the Construction Leadership Council's (CLC) update notes from late November 2024, it appears that this issue is especially prevalent in smaller refurbishment projects and work to existing higher-risk buildings^[1]. The CLC and BSR have stated that applications should include quality and detailed information that clearly and comprehensively demonstrates compliance with the requirements and building regulations.

Whilst there is limited guidance available to help the industry with this process, the BSR has published some key points to consider (as summarised [here](#)). The CLC has also issued an [update](#) with helpful suggestions, including that applicants should provide sufficient detail when identifying the specific elements that require building regulations compliance (to enable those not involved in the project to understand the position); clarify the approach taken to compliance; and include a narrative to justify and demonstrate compliance. This guidance and approach may assist applicants in drafting or submitting their applications.

General

The Gateways act as 'hard stop' checkpoints. Non-compliance may result in significant consequences and sanctions. The delays and issues above are having a significant impact on project progress. In addition, further approvals from the BSR may be required during a project, e.g. as part of the change control process. This could further delay completion of a project.

Industry issues and live examples

Anecdotal reports during 2024 illustrate the potential practical impacts of these delays on projects:

Delays: It has been reported that the expected determination periods are frequently not met. Similarly, applications have been rejected after considerable time periods and on what are perceived to be minor grounds following the BSR's request to extend the approval period.

This may result in disputes over the adequacy of information/documents supplied by applicants (such as developers), professional teams or contractors in support of HRB applications. Such delays can also impact cashflow and put pressure on programme and completion dates.

Costs: It is common for contracts we are seeing (both bespoke and standard forms like the JCT) to be silent on the costs associated with delays in the BSR (including its multidisciplinary team) reviewing an initial application, and the time and work associated with additional information or applications. Unless otherwise negotiated, the risk of meeting such costs sits with the contractor/consultant.

Disputes: Employers or developers may ask contractors or consultants for more information or services during the application process, leading to discussions about scope

creep or liability. There may also be disputes over the responsibility for the cost of further work required in order to achieve approval if the initial application is not successful.

Construction industry organisations have emphasised the practical challenges they're facing and the need for more open and transparent communication from the BSR to address such issues. Additionally, they advocate for providing early engagement or feedback from the BSR to minimise issues and streamline the application process. There are broader calls for enhanced communication among all relevant stakeholders, together with the need for clarity and consistency in managing such applications.

The real need for appropriate risk allocation

These issues and delays highlight the importance of parties carefully assessing and confirming appropriate risk allocation for the HRB process. This involves thorough consideration and drafting of contractual provisions relating to the project programme and budget and costs, entitlements to extensions of time and/or additional costs, changes in law, or the relevant grounds for suspension or termination. These may not be easy negotiations as developers could have an expectation that the industry has the expertise to obtain approvals within their required timeframe.

It is important to emphasise the uncertainty surrounding the new Gateway processes at the outset and manage expectations as to what can be achieved. In our experience, including clear parameters in tenders, fee proposals and contracts as to what timeframes and input have been allowed for, with entitlements for additional time and money if the process takes longer or involves more work, are practical examples of managing this risk. Additional information may also be required from the client or other parties on the project.

Concluding commentary

The delays in the Gateway Two and Three building control application processes are impacting the construction industry by affecting project timelines, costs, and the ability to meet contractual obligations. This is likely to continue as the sector and BSR adapt to the process and level of resource required. Industry bodies have emphasised the importance of the BSR engaging more promptly, openly, and transparently with stakeholders to address these issues and provide early feedback aimed at reducing conflicts and streamlining the application process. It is key that the risks of delay and additional work arising from these processes is discussed at the outset and responsibility for appropriately managing those risks clearly set out in contracts.

For any queries or support regarding the points raised in this update and how these may directly impact your contracts or projects, please contact Andrew Croft or Beale & Co's Contracts and Project Advisory Team.

[\[1\] Building Control Approval for Higher-Risk Building Work – Construction Leadership Council](#)

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